



## Recommendation 95-6

### **ADR Confidentiality and the Freedom of Information Act**

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(Adopted June 15, 1995)

The Administrative Dispute Resolution Act (ADRA) accords a substantial measure of confidentiality to oral or written communications made in a covered dispute resolution proceeding. This protection was based upon Administrative Conference Recommendation 88-11, which recognized that in promoting the use of alternative dispute resolution (ADR) in federal agencies “a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements.”

The confidentiality section of the ADRA, 5 U.S.C. 574, consists of a detailed set of standards reflecting generally the balance proposed in Recommendation 88-11. It is narrow in scope in that it is limited to communications prepared for the purposes of a dispute resolution proceeding. It does not protect an agreement to enter into a dispute resolution proceeding or the agreement or award reached in such a proceeding. It does not prevent the discovery or admissibility of otherwise discoverable evidence merely because the evidence was presented in a dispute resolution proceeding. It does not have any effect on the information and data necessary to document or justify an agreement reached in a dispute resolution proceeding. It also permits disclosure of a dispute resolution communication in special circumstances where all parties to the proceeding consent; where the communication has already been made public or is required by statute to be made public; or where a court determines disclosure is, on balance, necessary to prevent a manifest injustice, help establish a violation of law, or prevent harm to the public health and safety sufficient to justify disclosure.

In the final stages of the legislative process leading to the passage of the ADRA, a question arose as to the relationship between the confidentiality section and the Freedom of Information Act (FOIA). With the understanding that the importance of passing the dispute resolution bill without delay justified an interim solution, a provision, subsection 574(j), was added on the Senate floor<sup>1</sup> providing the confidentiality section would not be considered an Exemption 3 statute under FOIA.<sup>2</sup>

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<sup>1</sup> During this colloquy, Senator Levin summarized as follows: I am pleased that we were able, for the purposes of passing this bill this year and getting the ADR process rolling, to temporarily resolve the confidentiality issue. As the Administrative Conference of the United States wrote in its recommendation on this subject, \* \* \* since



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This last minute addition has created a narrow, but significant, problem in accomplishing fully the purposes of the ADRA. In those circumstances in which dispute resolution communications become “agency records” within the meaning of FOIA, the confidentiality of the records is determined not by the provisions of section 574, but rather by the terms of the exemptions to FOIA. For users of ADR, the trumping effect of FOIA in this class of cases means that confidentiality is not governed by the careful balance struck in section 574 but rather by the complex body of FOIA law which accords no special protection for dispute resolution communications on the basis of the process needs of ADR. While some dispute resolution communications that become agency records—for example because they come under the control of a government-employee neutral—may be exempt from mandatory disclosure under FOIA, the scope of the exemptions and possible gaps in coverage create uncertainty as to the confidentiality of such records.

This uncertainty, in turn, has become a disincentive to the use of ADR.<sup>3</sup> Even though the ADRA has been in place for only four years, concern about the impact of FOIA on confidentiality has had a chilling effect on the use of ADR. This effect could become even more substantial if a case arose in which expected confidentiality was undermined by a FOIA claim. To accomplish the objectives of Recommendation 88-11, the confidentiality standards of section 574 should be given effect with respect to all covered dispute resolution communications, even where those communications become agency records under FOIA.<sup>4</sup>

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settlements are essential to administrative agencies, a careful balance must be struck between the openness required for the legitimacy of many agency agreements and the confidentiality that is critical if sensitive negotiations are to yield agreements. The provisions in this bill, as amended, do not as yet achieve that balance, and I am pleased that Senators Grassley and Leahy have agreed to address this issue more completely next year. 136 Cong. Rec. at S18088 (daily ed. Oct. 24, 1990).

<sup>2</sup> Under Exemption 3, the FOIA disclosure requirements do not apply to matters that are “specifically exempted from disclosure by statute . . . provided that such statute (A) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.”

<sup>3</sup> Some added uncertainty has been raised by the ADRA's protection of “any information concerning” a dispute resolution communication. The recommendation calls for dropping this language.

<sup>4</sup> This recommendation pertains solely to the provisions of the ADRA. The Conference recognizes that agencies, in some circumstances, conduct similar processes under other authority.



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### Recommendation

1. The confidentiality section of the Administrative Dispute Resolution Act, 5 U.S.C. 574, should be amended to provide that records confidential under that section and generated by or initially submitted to the government in a dispute resolution proceeding are exempt from disclosure under the Freedom of Information Act, Exemption 3, 5 U.S.C. 552(b)(3).

2. Any alternative confidentiality procedures agreed to by the parties and neutral under subsection 574(d) should not, for purposes of Exemption 3, be construed to provide broader confidentiality than is otherwise available under section 574.

3. The words “any information concerning” should be deleted from section 574 (a) and (b).

### Citations:

60 FR 43115 (August 18, 1995)

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